

What is the nature and extent of claimant's injury? More particularly, did claimant suffer injury to her left upper extremity, including her shoulder, or is her disability limited to the left upper extremity without shoulder involvement?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified.

Claimant began working as a painter for respondent on December 15, 2004. Before that date, claimant had worked as an independent contractor on respondent's jobs. On January 7, 2005, while performing the job of spray painting in one of respondent's apartments, claimant slipped on a wet floor and fell. She grabbed the spray gun and accidentally injected her left hand with oil-based Kilz paint, causing claimant severe pain. She was taken to the Wesley Medical Center emergency room where she came under the care of board certified orthopedic surgeon James L. Gluck, M.D.

Claimant underwent emergency surgery by Dr. Gluck, at which time Dr. Gluck attempted to remove as much of the paint material as possible. A second surgery was performed on January 28, 2005, consisting of a cross-finger flap from her middle finger to her ring finger. Dr. Gluck then took a skin graft from her forearm to cover the middle finger. This was necessary due to the loss of skin and tissue beneath the skin, which was due to the injury. Dr. Gluck expressed significant concern that claimant would suffer an amputation due to the severity of the injury. A third surgery, which was performed on February 25, was necessitated to "take the flap down."¹ Claimant was then referred for physical therapy. On March 24, claimant was released to return to work as tolerated. On that date, claimant first voiced shoulder complaints.²

Claimant described increased left hand pain upon her return to work. Her work was restricted by Dr. Gluck to limit working overhead and reaching with her left shoulder or gripping and grasping with her left hand as tolerated by pain. Dr. Gluck last saw claimant on May 12, 2005, at which time claimant expressed ongoing pain in her shoulder and stiffness in the left ring finger.

On cross-examination, Dr. Gluck acknowledged that claimant was in severe pain immediately after the accident. Claimant was then placed on strong pain medication. The hand pain from the accident, coupled with the pain medication, would mask the shoulder pain. Dr. Gluck diagnosed claimant with a contusion to the acromioclavicular joint, possibly from the fall, and treated her shoulder with cortisone injections. He also found a slight sclerosis at the greater tuberosity.

¹ Gluck Depo. at 8.

² Gluck Depo. at 9.

Dr. Gluck rated claimant at 8 percent to the left hand, with a 9 percent upper extremity rating which included claimant's forearm. He did not rate claimant's shoulder, finding no objective data to support a shoulder rating. His ratings were pursuant to the fourth edition of the *AMA Guides*.³

Claimant was referred by her attorney to Michael H. Munhall, M.D., board certified in physical medicine and rehabilitation, for an examination on June 14, 2005. Claimant was diagnosed with traumatic injuries to her left hand and shoulder as a result of the fall and traumatic injection on January 7, 2005. Dr. Munhall found a causal connection between claimant's injuries, including the shoulder, and the work-related fall. He assessed claimant a 6 percent left upper extremity impairment due to left shoulder excursion, a 5 percent left upper extremity impairment for the left volar forearm scar, a 20 percent left upper extremity impairment for left hand grip weakness, and a 14 percent left middle finger impairment for range of motion and sensory loss of the finger, all resulting in a 33 percent left upper extremity permanent partial impairment. Dr. Munhall's ratings were pursuant to the fourth edition of the *AMA Guides*.⁴ During his testimony, Dr. Munhall identified several sections of the *Guides* which he used to reach his rating opinion. However, those sections of the *Guides* were not placed into evidence. The ALJ, in the Award, adopted Dr. Munhall's rating opinion and awarded claimant a 33 percent loss of use of the left upper extremity at the shoulder.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁵

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁶

The record contains two medical opinions regarding claimant's functional impairment. Both opinions were expressed pursuant to the fourth edition of the *AMA Guides*, as required by K.S.A. 44-510e. Respondent argues that Dr. Munhall's opinion cannot be accepted because he improperly used the *Guides*. Respondent goes on to cite several sections of the *Guides* in support of its position. However, those sections of the

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ *AMA Guides* (4th ed.).

⁵ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁶ K.S.A. 44-510e(a).

Guides were not placed into the record. The Board, in the past, has allowed the use of the *AMA Guides*, even though not part of the record, when utilizing the *AMA Guides* conversion chart. In *McGrady*,⁷ the Board ruled that the use of the *AMA Guides* conversion chart, even though it was not in the record, did not add evidence to the record and was proper. However, the Board has rejected attempts to introduce portions of the *Guides*, for the purpose of supporting a party's argument, without those sections of the *Guides* being placed into the record by the parties.⁸ The Kansas Court of Appeals, in *Durham*,⁹ was asked to consider whether the claimant could cite the *AMA Guides* when those guidelines were never introduced into evidence and were not a part of the record on appeal. The claimant, in *Durham*, attached the guidelines to his brief as an appendix. The court, in *Durham*, ruled that:

An appellant has the burden to designate a record sufficient to establish the claimed error. Without an adequate record, an appellant's claim of alleged error fails.¹⁰

The *Durham* court went on to find that the assertions contained in the claimant's brief were not sufficient to satisfy the inadequacies in the record. As the record, in *Durham*, did not include the *AMA Guides*, the court determined that the record contained no support for the claimant's argument concerning the *AMA Guides*. The claimant's argument was, therefore, rejected. The fact-finder is always free to find an opinion more persuasive or credible than another. But the fact-finder should not go outside the record in doing so. Respondent's argument, that Dr. Munhall's rating is not supported by the *Guides*, fails.

The Board, in considering the opinions of both Dr. Gluck and Dr. Munhall, finds no reason to give greater weight to one over the other. In averaging both, the Board finds claimant has suffered a 21 percent permanent partial disability based upon her functional impairment to the left upper extremity at the level of the shoulder. The Award of the ALJ is modified accordingly.

AWARD

⁷ *McGrady v. Delphi Automotive Systems*, No. 199,358, 1998 WL 229871 (Kan. WCAB April 6, 1998).

⁸ *Reiter v. State of Kansas*, No. 1,009,450, 2006 WL 931065 (Kan. WCAB March 31, 2006).

⁹ *Durham v. Cessna Aircraft Co.*, 24 Kan. 334, 945 P.2d 8, rev. denied 263 Kan. 885 (1997).

¹⁰ *Id.* at 334-335; citing *McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 (1994).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and Award Nunc Pro Tunc of Administrative Law Judge John D. Clark dated March 7, 2006, and March 10, 2006, respectively, should be, and are hereby, modified to award claimant a 21 percent permanent partial disability to the left upper extremity at the level of the shoulder, for an accidental injury which occurred on January 7, 2005, and based upon an average weekly wage of \$613.35, for 12 weeks of temporary total disability compensation at the rate of \$408.92 per week or \$4,907.04, followed by 44.73 weeks permanent partial disability at the rate of \$408.92 per week or \$18,290.99 for a 21 percent permanent partial disability to the left shoulder, making a total award of \$23,198.03.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contract the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary A. Winfrey, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director